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Argued by
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 795

THE UNITED STATES OF AMERICA,

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," etc.

BRIEF FOR THE RESPONDENT

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Opinions Below.

The opinion of the District Court (R. 25-36) is reported in 47 Fed. (2d) 336. That of the Circuit Court of Appeals (R. 44-47) has not yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered March 9th, 1932 (R. 48). The petition of certiorari was granted March 28th, 1932 (R. 48). Jurisdiction to issue the writ is based on section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether a vessel discovered in the act of transporting intoxicating liquors must be proceeded against under section 26, Title II of the National Prohibition Act, as was held both by the District Court and by the Circuit Court

of Appeals, or whether in lieu thereof a libel for forfeiture under section 4377 of the United States Revised Statutes for engaging in an unlicensed trade may stand.

Statutes Involved.

These are printed in the Appendix.

Statement.

The brief for the United States contains a comprehensive statement and for that reason such is omitted here.

Summary of Argument.

1. It is consonant with the language of section 26 and the intent of Congress as therein expressed to construe that statute as follows:

(a) It enjoins every officer of the law, whether he be a customs officer, a coast guardsman, or a prohibition agent, to seize the transporting vehicle under its terms.

(b) "In violation of the law," and "contrary to law" as used in that section is the equivalent of "contrary to law" in Section 593(b) of the Tariff Act and includes the violation of any law, such as the internal revenue or the Tariff Act. C. f. John H. Callahan v. United States, decided April 11, 1932, No. 576.

(c) Transported "or possessed illegally" as used in section 26 equally refers to an illegal possession of liquor in violation of any law, and includes the customs and internal revenue laws.

(d) Section 26 deals specifically with the vehicle and its objective is not the prosecution of the offender. It

refers to every type of conveyance, water and air craft and therefore contemplated the bringing in of liquor from the exterior of the United States.

(e) Its objective is the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, to the limited extent specified in that section.

(f) Whenever transportation *is involved* it applies.

Richbourg Motor Co. v. *U. S.*, 74 L. Ed. 1016, 281 U. S. 528.

2. Eliminate section 26 from our laws, and there remains a comprehensive system of laws which would render forfeit vehicles apprehended in the transportation of intoxicating liquor, for such statutes as are now being invoked as opposed to section 26 would still be applicable. It is therefore evident that the sole purpose of the enactment was to preserve the rights of the innocent claimant and lienor, and therefore the intent of Congress was to preclude the use of these other statutes.

3. The question of conflict between the statutes does not arise, it being sufficient to preclude any statute under which the rights of an innocent claimant and lienor are lost.

POINT I.

Whenever intoxicating liquors are transported contrary to law in a vehicle, the disposition of the vehicle must be had under the terms of section 26, title II of the National Prohibition Act.

Section 26, Title II of the National Prohibition Act deals exclusively with the liquor and the vehicle. It does not create the offense against the person. Its language is mandatory and governs the disposition of the vehicle. *Irrespective of what other statute may have been violated, if the facts bring it within the terms of section 26, Title II of the National Prohibition Act, then it and, it alone, controls.* No other statute preserves the rights of innocent claimants and lienors. Congress for the first time has departed from the Mosaic doctrine of absolute forfeiture irrespective of innocent interests, discarding the fiction that the res is the offender and it is guilty.

> *Goldsmith Jr. Grant Co.* v. *United States,* 65 L. Ed. 376, 254 U. S. 305.

Section 26 was therefore carefully drawn with that object in view.

> *Richbourg Motor Co.* v. *United States, supra.*

The opinion of this Honorable Court in the *Richbourg* case recognizes the obvious fact that there are other applicable statutes which must be violated contemporaneously with the violation of section 26, Title II of the National Prohibition Act and holds that the National Prohibition Act is the governing statute. The pertinent language of the *Richbourg* case reads as follows:

> "But the prescription in detail, by section 26, **whenever transportation is involved, of** successive steps to be taken, which, if followed, lead unavoidably to forfeiture **under that section and no other,** with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under section 26 **or any other applicable statute,** most of the requirements of section 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of section 3450, that the offending vehicle 'shall be forfeited,' saving the rights of innocent lienors if the proceeding were had under section 26."

Nor is there any gainsaying but that such was the obvious intent of Congress and necessarily, to accomplish such purpose the language of the statute had to be couched not in prescriptive nor directory verbiage, but as drawn, in mandatory language. It was apparent to Congress when it enacted section 26 that statutes existed which were more drastic in their consequences, and for that reason, except for the mandatory provisions of section 26, the purpose of the said section might have been rendered unavailing since other applicable statutes more drastic than section 26 would defeat the purpose.

Suppose Congress had not enacted section 26 at all. Plainly vehicles used for liquor transportation would be absolutely forfeitable under applicable statutes such as revised statute 3450 or sections 3061-2 and the various other applicable Tariff acts as well as the navigation laws. But it was enacted in the face of all these comprehensive statutes. It conflicts with any statute having application

which results in the loss of interest in the vehicle irrespective of the innocence of the claimant or lienor. Section 26 might just as well have been omitted if other statutes could inflict absolute forfeitures or impose liens against vehicles irrespective of the innocence of the claimant or lienor.

It is difficult to perceive a case where the facts bring it within the terms of section 26, and yet, not within the terms of some other statute with the drastic consequence of absolute forfeiture.

A construction of section 26 which would allow a forfeiture under any other statute where the facts bring it within its terms would be to render section 26 nugatory and the passage of that act an empty ceremony. Subtle distinctions and fine reasoning may serve to raise doubts, but the evident intent of Congress is too clear to admit of any dispute.

It is clear that when Congress in Section 26 included water or aircraft and listed every possible means of conveyance, it had in mind the bringing in of liquor into the country from outside of its borders. Section 26 is most comprehensive, exceedingly broad in its scope, clear and definite in its purpose and specific with respect to the consequences of the illegal use of a vehicle in the carriage of intoxicating liquors.

To accomplish the apparent purpose of superseding and supplanting all other applicable statutes, Congress employed the mandatory language used in the section without which its purpose could not have been accomplished. This unequivocal expression of Congress should not be upset by judicial interpretation if it is possible to give effect to such intent.

A detailed analysis of section 26 reveals not alone that its provisions are mandatory, but also exclusive with respect to the disposition of a vessel found transporting in-

toxicating liquors. Its disposition when discovered in use in transporting intoxicating liquors is commanded by the terms of that statute. The section opens with the following language:

> "When * * * any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon," etc.

The phrase "in violation of the law" is equivalent to "contrary to law" and is sufficiently broad to include any law, navigation or customs. Just as in the case of

> *John T. Callahan* v. *U. S.*, decided April 11, 1932, No. 576,

the phrase "contrary to law" included a violation of the National Prohibition Act, it may with equal reason be argued that the phrase "in violation of the law," and "contrary to law" in section 26 of the National Prohibition Act, includes customs or navigation violations. And too, with equal force it may be argued that section 26, Title II of the National Prohibition Act deals specifically with the vehicle and its disposition, whereas the Tariff Act sections invoked in the companion case,

> *General Import & Export Co., Ltd.* v. *United States*, No. 811

do not specifically deal with the vehicle.

As a further reason which seems quite convincing that section 26 was to supplant and supersede all other statutes which may be held applicable, we find that Congress in its language imposes the duty of invoking that section on every officer of the law, for it states:

> "When the commissioner, his assistants, inspectors, *or any officer of the law* shall discover * * *." (Italics ours.)

Thus, comprehended within its injunction, are customs guards and coast guardsmen as well as prohibition agents.

Note further the following language of section 26:

> "Whenever intoxicating liquors *transported or possessed illegally* shall be seized by an officer, he shall take possession of the vehicle * * *."

The use of the phrase "transported or possessed illegally" renders the statute even broader in its scope and evinces the intention of Congress to deal with the transporting vehicle under section 26 when the liquor is illegally possessed on such transporting vehicle. The illegal possession there referred to is broad enough to include an illegal possession by virtue of the infraction of any law, be it customs or internal revenue or navigation by a vessel having liquor aboard in violation of its license. This construction of section 26 accords with the construction given section 593(b) of the Tariff Act of 1922 in the *Callahan* case, *supra*. It may also be added in support of this construction of section 26 that not alone is its language mandatory but also it saves the rights of innocent owners and lienors and Courts should be astute to save such rights unless Congress has evinced another intention by language equally as clear.

The problem presented by the group of cases touching on section 26 is not as difficult of solution as may seemingly appear from the resourcefulness of the government in its endeavor to circumvent the holding of this Court in the *Richbourg* case. It may not be amiss to point out at this time that the *Richbourg* case was not the moti-

vating cause for the assertion of the application of section 26 in the case at bar. The history of the case at bar, as well as its companion case, No. 811, reveals that the contention was made that section 26 applied exclusively, prior to the decision in the *Richbourg* case, and even prior to the granting of the writ in said case. The confusion, if any, exists by reason of the government attempting to invoke the more severe and drastic penalty in the face of the definite purpose of Congress to protect the innocent claimant and the innocent lienor. What good reason in conscience can exist for the imposition of the more drastic penalty if its imposition is justified solely by reason of possible executive clemency. The plain fact is that Congress, aware of the fact that numerous seizures would be made of vessels and vehicles carrying intoxicating liquors, fearing the consequent ruination of our credit system and in order to obviate this undesired result, made it plain in section 26 that it would depart from the usual course and preserve the innocent claimant's rights as well as those of the innocent lienor. In carefully chosen language it made it unambiguous and unequivocal that wherever a seizure of a vehicle or vessel is made upon which intoxicating liquors is being transported, *the disposition of the vehicle shall be made in accordance with the terms of that section,* regardless of what department the seizing officer may represent.

Suffice it to say that innocent lienors and innocent claimants lose their rights by resort to another statute, and such other statute necessarily falls if there is a transportation by the use of such vehicle, of intoxicating liquors. To rule otherwise would be to render nugatory the provisions of section 26.

The argument is advanced at page 12 of the government's brief that

> "It was wholly immaterial to the offense with which the vessel was charged that it carried intoxicating liquor. The vessel would have been equally subject to forfeiture if it had carried a cargo of silk or sugar."

The same argument exists with relation to Revised Statutes section 3450. If instead of intoxicating liquor the cargo had been tobacco, upon which the tax had not been paid, the vessel would have been forfeited absolutely without regard to the rights of an innocent owner or lienor. The plain fact is that Congress legislated in a specific fashion as to a specific merchandise, to wit, intoxicating liquor. When the transportation involves a transportation of such merchandise, section 26 governs. It may be far-reaching in its result but it is new in our law, for as already pointed out, no statute heretofore passed has preserved such rights and the language of such statute had to be, as it was, made clear and unequivocal with such object in view. It remains with the Legislature to change it if it so desires, but apparently Congress was content with the *Richbourg* decision as it construed the terms of section 26.

The government states at page 11 of its brief:

> "It seems clear that the substance of the offense involved in the *Richbourg case* was the unlawful transportation of intoxicating liquor. There was no evidence of removal or concealment of intoxicating liquor with intent to defraud the United States of tax thereon *except as such removal or concealment was necessarily involved in any unlawful transportation of intoxicating liquor*. The Government there invoked an old internal revenue statute, more rigorous than the one made applicable to liquor transportation cases by the National Prohibition Act, to meet a situation it was not originally intended to meet."

To paraphrase, it seems equally clear that the substance of the offense involved in the instant case was the unlawful transportation of intoxicating liquor. There was no evidence of the illegal use of the vessel except as such illegal use thereof was necessarily involved in the unlawful transportation of intoxicating liquors. The government here invokes Revised Statutes section 4377, more rigorous than the one made applicable to Prohibition cases by the National Prohibition Act, and which was even an older statute than section 3450 of the Revised Statutes.

It is not the age of the statute, nor its context nor an analysis as to whether or not such statute conflicts directly with section 26 which governs the problem in the case at bar. The issue is to be determined by the intent of Congress as expressed in section 26. We have endeavored to point out the enormous scope of section 26 and the government takes the position that it does not apply to importation by a vehicle. The government's brief in No. 579 states:

> "On the other hand in the National Prohibition Act Congress did not provide completely or comprehensively for the control of unlawful importation of liquor. Thus, that act contains no specific provision for the forfeiture of vehicles used in the unlawful importation of intoxicating liquors."

This contention is unsound. Within the meaning of the National Prohibition Act an importation takes place when the vessel arrives within the three-mile limit.

Cunard Steamship Co. v. *Mellon*, 262 U. S. 100, 67 L. Ed. 894.

Such arrival within the three-mile limit necessarily constitutes a transportation within the United States, and

therefore, even though section 26 does not specifically refer to illegal importation of intoxicating liquors on board of a vessel, *still it is sufficiently broad to reach the vehicle* in such enterprise.

The Circuit Court of Appeals for the Second Circuit, in the case of

United States v. *One Packard Truck*, 55 Fed. (2d) 882

held section 26 applicable exclusively where a truck was apprehended not in motion but under circumstances which revealed that it was part of a transaction involving the transportation of intoxicating liquors.

While the record does not reveal that the claimant in the case at bar was guilty, even if such were the fact, resort to section 26 must be had despite it. See

United States v. *One Packard Truck, supra.*

> "In the Richbourg case the claimants asserted interests as innocent lienors, and the inconsistency between section 3450 and section 26 was found to exist in the fact that the latter section protects the rights of innocent persons while the former section does not. In the present case the claimant did not assert he was innocent nor did he offer any evidence. Conceivably the Richbourg decision might be limited to a situation where a claim of innocent interest was asserted; forfeiture being allowable under either law as against an owner who did not allege and prove his innocence. Such a view would be subject to the practical objection of leaving uncertain until the conclusion of the trial which law was applicable. Moreover, section 26 seems to make it the duty of the arresting officers to proceed as directed in that section regardless of whether innocent persons are

> interested in the seized vehicle. We read the Supreme Court's opinions as laying down the rule that the *arrest of a person discovered in the act of transportation* requires proceedings for forfeiture to be taken under section 26, even as against an owner who participated in the illegal transportation with full knowledge."

Furthermore, the guilty claimant of a vehicle is vitally affected by a failure to invoke section 26 if it properly should be invoked. There may be a lien by an innocent holder upon his vessel which may be collected out of the vessel, and such rights would be lost if resort were had to any statute other than section 26.

We subscribe to the government's contention in No. 574 where at page 7 of its brief, it states:

> "The same reasoning which would sustain a holding that the forfeiture provisions of section 3061-3062 of the Revised Statutes are impliedly repealed by section 26 would probably apply to cases where other forfeiture provisions of the customs laws are involved, and likewise to forfeiture provisions in the navigation laws."

This Court has not held section 26 applicable to the exclusion of Section 3450 for any reason other than the fact that by the latter statute innocent claimants and lienors lose their interests.

In

United States v. One Ford Coupe Automobile,
71 L. Ed. 279, 272 U. S. 321,

there was no reference made in the complaint "to removal or transportation of liquor." Mr. Justice BRANDEIS, delivering the opinion of the Court states:

"The case at bar does not present any conceivable question of cumulative remedies or of election. While the second sentence in section 26 uses the words 'transported or possessed,' the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law."

Mr. Justice STONE, concurring, stating regarding Revised States section 3450 and section 26:

"But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition law with intent to defraud the United States of the tax. In that case sec. 26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section. In that event sec. 26 saves the interest of the innocent owner or lienor from the forfeiture required by section 3450. It appears to me that the conflict in such a case is direct and that section 26 by its terms is controlling."

Mr. Justice BUTLER, dissenting, stated as follows:

"Section 3450 forfeits the vehicle of an innocent owner or lienor. Section 26 expressly protects his property. The conflict as to the disposition of the automobile is direct, and that is the matter in controversy."

Mr. Justice BRANDEIS in the case of

Port Gardner Investment Co. v. *United States*,
71 L. Ed. 412, 272 U. S. 564

delivering the opinion of the Court, stated as follows:

> "The disposition of the automobile prescribed in section 26 became mandatory after Neadeau's conviction; and being inconsistent with the disposition under section 3450 necessarily precluded resort to proceedings under the latter section."

In concluding, it may not be amiss to cite certain portions of the opinion of this Court in the case of

Richbourg Motor Co. v. *United States, supra.*

which serve to illustrate that the construction of section 26 contended for herein is borne out by this Court:

> "The objective of section 26 is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, **to the limited extent specified in the section.** Every act which it enjoins on public officials is directed to that end."

And again:

> "We think that Congress did not take the precaution to enact the carefully chosen language of section 26 merely to impose general duties on prosecuting officers already placed on them by other sections of that act, but that its purpose was to preclude *the nullification of the protection which section 26 had extended to innocent third persons.*" (Italics ours.)

Thus, even in the face of an arrest under another statute, where the vehicle was apprehended in the transportation of liquors, the effect of this Court's holding is that the law makes the election and the proceedings must be had under section 26. If the law makes the election,

then the question of direct conflict or inconsistency between statutes does not even arise, for the sole statute which deals with the vessel and its disposition is section 26, irrespective of any other statute which may by its terms have application.

Respectfully submitted,

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Appendix.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> **Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle.** When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding

brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

Penalty for violation of license. Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.